STATE OF MICHIGAN

COURT OF APPEALS

MITCHELL J. HOUSEY, JR., Personal Representative of the Estate of DONALD J. HOUSEY, Plaintiff-Appellant,	UNPUBLISHED April 8, 2014
v	No. 309060 Macomb Circuit Court
MACOMB COUNTY PROBATE COURT, Defendant-Appellee.	LC No. 2010-001652-CD

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendant on plaintiff's claim under the Whistleblowers' Protection Act, MCL 15.361 *et seq*. We reverse and remand.

Plaintiff's decedent[1] was employed by defendant for a number of years and was the Probate Court Administrator at the time of his discharge in 2010. He filed this action claiming that his discharge was in retaliation for activity protected under the WPA. He specifically cites to reports he made to the State Court Administrative Office and his cooperation in investigations by SCAO, as well as his cooperation with the Judicial Tenure Commission in the investigation of one of defendant's judges. Plaintiff was terminated in early 2010, shortly after the appointment of a new chief judge, Judge Switalski.

We review the trial court's decision de novo. See *Manzo v Petrella and Petrella & Assoc, PC*, 261 Mich App 705, 711; 683 NW2d 699 (2004). In determining whether there was a genuine issue of material fact, we give the benefit of any reasonable doubt to the nonmoving party and determine whether there remains an issue of fact upon which reasonable minds may differ. *Id.* At issue is whether plaintiff has established a genuine issue of material fact regarding the first and third requirements in establishing a prima facie case under the WPA, namely

[1] Donald Housey died during the pendency of this action. For convenience, we shall refer to him simply as "plaintiff" in this opinion.

whether plaintiff had engaged in protected activity under the WPA and whether a causal connection existed between the protected activity and plaintiff's discharge. The second element of a prima facie case, that plaintiff was discharged, is not disputed. See *Manzo*, 261 Mich App at 712.

The first element can be established by showing that plaintiff reported a violation of law, regulation, or rule to a public body, that he was about to make such a report, or was asked to participate in an investigation by a public body. *Id.* at 712-713. Defendant first argues that plaintiff's complaints to SCAO and cooperation with the JTC investigation involved the conduct of a judge who was not the decision maker regarding plaintiff's termination. But we are not aware of any requirement, nor does defendant point to any such authority, that the complaints or investigation must involve the decision maker. Similarly, defendant argues that cooperating with the JTC investigation cannot be deemed protected activity because plaintiff merely complied with subpoenas and had no knowledge about the reasons behind the JTC investigation. Again, however, defendant points us to no basis to conclude that plaintiff had to know the reason for the investigation, nor that the decision maker had to know. It may be sufficient to a decision maker to terminate an employee merely because the employee cooperated with any investigation without regard to the purpose of the investigation.

Defendant also argues that plaintiff's reports to SCAO and cooperation with the JTC do rise to the level of protected activity because they did not involve violations of law. But plaintiff's exhibits clearly established that his reports to SCAO did allege violations of law, rules or regulations. While it is not clear whether the JTC investigation involved violations of law, rules or regulations, it would seem likely that it would, inasmuch as that is its job. But, in any event, MCL 15.362 protects an employee who is asked by a public body to participate in an investigation, hearing, or inquiry and does not by its terms limit that protection to investigations of a violation of law. That is, it does not matter whether the investigation involves a violation of law, regulation or rule.

Finally, defendant argues that plaintiff's communications with SCAO and the JTC were part of his job duties and that it is "counter-intuitive" to call performing one's job as engaging in protected activity. Defendant suggests that to do so would unnecessarily insulate an employee from adverse consequences for performing his job duties. But defendant has it backwards. Where the performance of a job duty would require engaging in protected activity, the WPA protects the employee who performs that duty. The employee who fails to perform his job duty—i.e., fails to make such a report—and is fired for failing to perform his job duty would not have engaged in protected activity.

The real issue in this case goes to the third element, whether plaintiff can establish a causal connection between the protected activity and his discharge. Clearly, the evidence on this point is thin. Defendant offers strong evidence that Judge Switalski did not terminate plaintiff because of his protected activity, but that it was based upon the judge's perception of plaintiff's own responsibility regarding the problems faced by the Probate Court as well as his absenteeism. Plaintiff, however, does have some evidence, albeit minimal, regarding causation. Plaintiff can present evidence that Judge Switalski became upset and hostile towards him after learning of plaintiff's protected activity and that plaintiff had overheard a conversation which could be

interpreted as the judge who had been the focus of the SCAO complaints and JTC investigation lobbying Judge Switalski to replace plaintiff and thanking Judge Switalski when he did so.

It is far from certain that a jury would reject the proffered legitimate reasons for plaintiff's discharge and accept plaintiff's evidence as being sufficient to establish that the true motivation was to retaliate against plaintiff for engaging in activity protected under the WPA. But that is a determination for a jury to make, not for this Court or the trial court to do so in a motion for summary disposition.

Finally, although it is not entirely clear whether the trial court based its ruling on defendant's argument that plaintiff's claim was not filed within the period of limitation, both parties address this issue on appeal. And, in any event, defendant's argument is without merit. MCL 15.363 requires that an action be brought within 90 days of the alleged violation of the act. It is undisputed that plaintiff filed his action within 90 days of his termination. Therefore, the action was timely filed.

For the above reasons, we conclude that plaintiff has established a genuine issue of material fact to establish a prima facie case under the WPA and to rebut defendant's claim of a valid reason for the termination. Accordingly, the trial court erred in granting summary disposition in favor of defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen